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Supreme Court, U.S.
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No. 01 -1521

IN THE

Supreme Court of the United States

ISLAMIC REPUBLIC OF IRAN,

Petitioner,

v.

MCKESSON HBOC, INC., et al.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

IRAN'S REPLY TO MCKESSON'S OPPOSITION

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I. THE COURT OF APPEALS' INTERPRETATION OF THE TREATY OF AMITY IS WRONG AND SHOULD BE REVIEWED NOW BEFORE IT DISTURBS THE RELATIONS OF THE UNITED STATES WITH OTHER SOVEREIGNS.

The Overseas Private Investment Corporation ("OPIC"), speaking through the Solicitor General of the United States, agrees with Iran that the Treaty of Amity, Economic Relations, and Consular Rights Between the United States of America and Iran, 8 U.S.T. 899 (1957), (hereafter "Treaty of Amity" or "Treaty") does not provide a U.S. national with a private cause of action in a United States court. OPIC Opp. 9-14.[1] In consequence, Iran will address only McKesson's argument that the court of appeals' interpretation of the Treaty, even if error, "does not merit review." McK. Opp. 8.

McKesson argues that Iran has not challenged in this Court the district court's alternate ruling that there is an independent cause of action under customary international law ("CIL"); consequently, a ruling in Iran's favor on the Treaty issue "would have no substantive impact on the case." Opp. 8-9. Iran, however, did challenge the district court's CIL ruling in the court of appeals, and a ruling in Iran's favor on the Treaty issue in this Court would presumably result in a remand to the court of appeals to rule on the CIL issue. The Solicitor General has stated that basing the action on CIL raises "even more difficult questions" than basing it on the Treaty. OPIC Opp. 15. One would expect that remanding to the court of appeals would result in a ruling that CIL provided no cause of action, so it is likely that a ruling by this Court in Iran's favor on the Treaty would have a substantive impact on the case.

McKesson further argues that sustaining a private cause

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[1] Iran addresses OPIC's separate arguments against review in Iran's Reply to OPIC's Opposition.

of action under the Treaty will have no impact on the United States' ability to assert its immunity defense in the courts of Iran or any other country with which it has a similar treaty. McK. Opp. 13-14. However, the Solicitor General also agrees with Iran on this point. OPIC Opp. 14. As we show in Iran's Reply to OPIC's Opposition, pp. 2-3, the decisions of the district court and the court of appeals in this case will provide particularly rich precedents for new cases by U.S. nationals against foreign states in U.S. courts, as well as rich precedents for suits against the United States in foreign courts.

II. THE NELSON AND WELTOVER QUESTIONS PRESENTED MERIT REVIEW.

McKesson argues that the court of appeals' decision does not conflict with Saudi Arabia v. Nelson, 507 U.S. 349 (1993), because "Nelson does not require that **every** element of a claim be jurisdiction conferring," and "jurisdiction was sufficiently established by the cessation of dealings ...." Opp. 16, emphasis in original. Nelson, McKesson continues, does not "prevent[] a court, once its jurisdiction is established, from determining whether the defendant is liable based on acts that are part of the same cause of action but that might not independently confer jurisdiction." Id. 16. We disagree.

The implication of McKesson's argument is that **any** element of a claim or cause of action can confer jurisdiction over **all** of the other elements. On McKesson's argument, the breach of one contract payable in the United States with small consequent damages confers jurisdiction over a breach of contract payable only in Iran with much larger damages if both breaches are alleged as part of one "claim" or "cause of action" for expropriation even though proof of the first breach does not

prove the second, or vice versa.[2]

After Nelson, a plaintiff must show that the "gravamen of the claim" has the required jurisdictional nexus with the United States. Even if Iran goes too far in arguing that the denial of dividends is the only "legally significant act," Petition ("P") 20-24, the denial is clearly the principal act upon which the district court relied in concluding that McKesson's "shareholding rights" had been expropriated. See PA 115a.[3] The denial of dividends is also the principal act relied upon by the Tribunal in concluding that the evidence as to expropriation was "finely balanced" as of its jurisdictional cut-off date of January 19, 1981.[4] In consequence, even if the supposed

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[2] McKesson is correct that the Tribunal found that Pak breached certain contracts with McKesson. Opp. 17-18 & n. 13. The Tribunal, however, ruled separately on "the expropriation claim," L-200-210, 214, (valued by the district court at about $7,000,00, PA 85a) and "the contract claims," L-210-214 (valued by the Tribunal at about $650,000). The Tribunal denied the first while in large part granting the second, though only against Pak, not Iran, L-213. McKesson has lumped these claims together as one "cause of action" for expropriation, but they are not closely related.

[3] The district court's damages memorandum and judgment, PA 27a-87a, is consistent with this interpretation of its liability ruling. The district court based damages on the denial of shareholder rights, see PA 38a, not the cessation of other contacts. No separate or additional award was made for the cessation of contacts.

[4] The Award refers to the denial of the two dividends due before January 19, 1981, as the "only significant" act which appears to have been done with the object of discriminating against McKesson. McKesson's Lodging ("L") 205-206. The U.S. arbitrator, Judge Holtzmann, states in his dissent that there could "hardly" be a "greater interference with a shareholder's rights than the denial of dividends," L-216, that the "bare refusal" to permit McKesson to share Pak's profits "suffices to establish expropriation," L-220, and that the only "meaningful" right of a minority shareholder such as McKesson was to share in Pak's profits, L 224.

cessation of contacts could not confer jurisdiction over the expropriation claim for the other reasons advanced by Iran,[5] it could not do so because the cessation of contacts was not the "gravamen" of the complaint.

The court of appeals' jurisdictional ruling is not only in conflict with Nelson's gravamen requirement in fact, it also conflicts in theory. Neither of the court's two opinions even mentions the "elements of a claim" or the "gravamen" requirement. The two opinions in effect restate the "nexus" test once relied upon by the Second Circuit but disapproved by this Court in Nelson. See P 15-16. The court of appeals' ruling is also in conflict, at least in result, with the Circuit Court decisions relied upon by Iran in its Petition. P 16-17 and n. 11-13. In none of those cases did the court find jurisdiction over a claim based on an act that was not the gravamen of the claim.[6]

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[5] Iran also argued that the supposed cessation of (other) contacts (assuming this actually took place, see P 7, n. 2, and 23-24) was not shown by an opinion on Iranian law to be actionable and thus could not count as an actionable act that caused a direct effect. P 20-22. McKesson denies the relevance of Iranian law because the district court found causes of action under the Treaty and CIL. Opp. 19. Given OPIC's concession that these sources of law are not available, OPIC Opp. 9-15 and n. 6, McKesson's argument must be rejected. Even if the Treaty or CIL provided the cause of action, all of the parties relied on non-discriminatory Iranian law to determine whether McKesson's legal rights had been violated. See P 20. Thus, the cessation of contacts is not only not the gravamen of the claim, it is not even an element of the claim.

[6] McKesson argues there is no conflict relying on Voest-Alpine v. Bank of China, 142 F.3d 887, 892 (5th Cir. 1998), and Sun v. Taiwan, 201 F.3d 1105, 1109-1110 (9th Cir. 2000). In Voest, the cause of action was failure to pay on a letter of credit. The element of the cause of action upon which the court found the claim to be based was the failure to pay, id., 142 F.3d at 896, clearly the gravamen of the cause of action. In Sun, the court of appeals remanded for a determination whether the Taiwanese authorities, operating as tour organizers, violated California law by failing to disclose

This case thus presents the question whether, in a case where the gravamen is breach of a contract to pay dividends that are payable only abroad, jurisdiction may be established because related commercial activity had a direct effect in the United States. This issue, we submit, is sufficiently general, and the court of appeals' ruling sufficiently against the weight of Circuit Court authority, as well as Nelson, to merit review by this Court.

Although it made other arguments to support its claim of Nelson error, P 20-24,[7] Iran submits that its "gravamen" argument suffices. We therefore turn to the issue of direct effect on the assumption that the act that must have a direct effect is

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in the United States known information concerning prospective dangers at the beach in Taiwan where Peter Sun drowned. Id, 201 F.3d at 1110. Quite clearly the failure to warn of these dangers was the gravamen of the California tort. See also, e.g., Drexel Burnham v. Galadari, 12 F.3d 317, 329 (2d Cir. 1993)(no jurisdiction where the claimed commercial activities were only "tangentially related" to the "gravamen of these claims").

[7] The "consequence" of McKesson's failure to file a statement of genuine issues, see Opp. p. 20-21, is that Iran's statement of material facts should be taken as conceded, including the assertion that "[n]one of the actionable acts that Iran is alleged to have committed in this case entailed an obligation to pay in the United States." The supposed interference with McKesson's right as a shareholder "to a voice in Pak Dairy's management," Opp. 20, can scarcely count as a significant element of McKesson's claim, where it is undisputed that McKesson withdrew its directors from Pak's board over Pak's protest. See P 23-24. Nor could a "freeze-out," Opp. 29, (assuming there was one) provide the jurisdictional contact if no part of the "freeze-out" entailed an obligation to pay in the U.S. and such an obligation was a prerequisite for an act causing a direct effect. In all, Iran made four arguments, in addition to its gravamen argument, that eliminate the "cessation of contacts" or "freeze-out" as providing an act causing a direct effect in the U.S., (1) it did not happen, (2) it was not shown to be actionable, (3) it was procedurally forfeited, and (4) it did not cause an immediate effect.

the denial of dividends.

Iran agrees that in Republic of Argentina v. Weltover, 504 U.S. 607, 618 (1992), this Court held that a place of payment in New York, without more, was **sufficient** to establish direct effects jurisdiction, not that it was **necessary**. See Opp. 22, emphasis in original. Iran's argument is that other circuits courts have, following Weltover, adopted the so-called place of payment test; but regardless whether those courts were correct, the "effect" in this case was not an "immediate consequence" of the relevant actionable acts - the denial of dividends - as required by Weltover. P 17-20.

McKesson's ultimate argument on this point is that this Court should not apply the "place of payment" test "because McKesson is headquartered in this country." Opp. 20. "Iran's decision to withhold McKesson's dividend payments thus had as a direct consequence McKesson's non-receipt of those payments in the United States, regardless of where the monies were to be paid initially by Pak Dairy." Opp. 23. McKesson makes no attempt to counter Iran's showing, P 19-20, that the non-payment was not "immediate" as required by Weltover, 504 U.S. at 618.

This case therefore presents the question whether, in a case based on breach of a contract payable only abroad, there is a direct effect here if the plaintiff is a U.S. entity, although there would be no direct effect if the plaintiff were an alien. This issue, we submit, is sufficiently general, and the court of appeals' ruling sufficiently against the weight of circuit court authority, as well as Weltover, to merit review by this Court.

III. REFUSING TO GRANT IRAN SUMMARY JUDGMENT BASED ON ITS UNOPPOSED AFFIDAVITS AND LEGAL OPINIONS MERITS REVIEW BECAUSE IT CONSTITUTED A DENIAL OF JUSTICE.

Only in n.18 of its Opposition, pp. 24-25, does McKesson confront Iran's argument, P 24-25, that its motion for summary judgment should have been granted because its affidavits and legal opinions were unopposed.

McKesson argues that the district court was not bound to accept the unrebutted legal opinions because they were "unsupported and otherwise flawed." Opp. 24, n. 18. Obviously, they were supported. Iran submitted a total of five unrebutted affidavits and seven unrebutted legal opinions. P 24-25, Ir. Opp. to CP 8. These affidavits and opinions were not only supported by each other but by documents from Pak's files and citations to statutes and other sources of Iranian law. Nor did they contain any inconsistencies or any other "flaws."[8]

The three cases McKesson cites do not support its position. McKesson has misread Universe Sales Co., Ltd. v. Silver Castle, 182 F.3d 1036 (9th Cir. 1999).[9]

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[8] McKesson's arguments, Opp. 24-29, that Iran's affidavits and legal opinions were unsupported, inconsistent or otherwise insufficient, summarize the same arguments made at greater length in its Cross-Petition ("CP") , pp. 13-19. Iran has already addressed these arguments in its Opposition to the Cross-Petition, pp. 6-16.

[9] Iran cited Universe Sales, supra, for the proposition that unrebutted legal opinions should be accepted as establishing foreign law. McKesson argues that the case is distinguishable because "the district court refused even to consider the expert's opinion on the foreign law issue in question," relying on footnote 2 in the opinion. Opp. n. 18. What note 2

We agree that a federal court is not necessarily bound by an expert's testimony on foreign law, but in Chantier Naval Voisin v. M/Y Daybreak, 677 F. Supp. 1563, 1567 (S.D.Fla. 1998), there was only one expert and, after stating the principle that he was not bound by the expert's testimony, the district court seems to have accepted his conclusions anyway.

In Application of Chase Manhattan Bank, 191 F.Supp. 206, 210 (S.D.N.Y. 1961), the proffered experts were not members of the bar of the foreign state and the factual information was not in affidavit form. Iran's three legal experts were (1) a former Deputy Chief Justice of the Iran's Supreme Court Justice, Joint Appendix ("JA") 362, (2) an experienced practicing litigator, professor, former judge, bar examiner, and author of numerous articles on Iranian law, JA 337-338, and (3) a former Iranian judge, editor of the translation into English of the Commercial Laws of Iran, and the Iranian law expert at the U.S. Library of Congress, JA 443-444. Iran's factual witnesses testified on personal knowledge, JA 327, 355-359, or based upon Pak's business records maintained under the witness' control, JA 250-251. They provided sworn testimony.

If there is any case in which unopposed affidavits and legal opinions on foreign law should be deemed conclusive, this is that case. McKesson and OPIC, a large U.S. corporation and an agency of the U.S. government, were ideally positioned to obtain affidavits or legal opinions in opposition to Iran's. Iran submitted 12 affidavits and opinions. McKesson and OPIC, however, chose not to submit any opposing affidavits or

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says, however, is just that the court of appeals could "find no indication in the record" that the district court had considered "that portion" of the expert's opinion, not that the district court had "refused to consider" the expert's opinion. Universal Sales at 1039, n. 2.

opinions. Iran was entitled to summary judgment not only as to the jurisdictional facts but as to the merits facts. The district court's failure to grant summary judgment in favor of Iran constituted, in international law terms, a "denial of justice." See I. Brownlie, Principles of Public International Law, (5th Ed. 1998), pp. 531-533. The exercise of this Court's supervisory power is called for. See Supreme Court Rule 10(a).

CONCLUSION

For the foregoing additional reasons, Iran's petition for certiorari should be granted.

Respectfully submitted,

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